Filed 5/31/19 In re J.B. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.B., a Person Coming Under the Juvenile Court Law.	H045837 (Santa Clara County Super. Ct. No. 17-JV-42487A)
THE PEOPLE, Plaintiff and Respondent, v. J.B., Defendant and Appellant.	

After admitting his commission of two felony sex offenses when he was 15, appellant J.B., by then an adult, was found to have come within the provisions of Welfare and Institutions Code section 602, subdivision (a). On appeal, he contests only the disposition order, in which he was committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ)[1] rather than being allowed to live in a Sober Living Environment or being treated while housed in county jail. We find no abuse of discretion on this record and therefore must affirm the order.

[1] The parties also note the alternate reference to the Division of Juvenile Facilities (DJF), formerly the California Youth Authority.

Background

Appellant was charged by second amended petition with rape in concert of a minor at least 14 years old, in violation of Penal Code section 264.1, subdivision (a)[2] and (b)(2) and sodomy in concert of a minor 14 years of age or older (§ 286, subd. (d)(3). These charges arose from an attack on 14-year-old N.M. in the laundry room of her apartment complex. J.B. walked the intoxicated victim to the laundry room and stood outside while three other boys and an adult male sexually assaulted her. J.B. then sodomized N.M. while she was unconscious. The offenses were committed on April 10, 2014, two weeks before appellant turned 16.

An investigation into the attack on N.M. were not complete until appellant was being questioned in connection with another sex offense for which he had been arrested in May 2017, just after he turned 19. The victim in that case was not unconscious, and either appellant or his accomplice placed a pillow over the victim's head in committing the offense. The charges on that occasion were resolved by appellant's no contest plea to unlawful sexual intercourse with a minor (§ 261.5, subd. (c)) and furnishing marijuana to a minor (Health & Saf. Code, former § 11361, subd. (b)). Seven other charges were dismissed. Imposition of sentence was suspended, and appellant was granted probation for three years on the condition that he participate in substance abuse treatment and outpatient sex offender treatment, but with no requirement that he register as a sex offender.

After initially denying involvement in the 2014 offenses against N.M., appellant admitted his participation. On March 8, 2018, after the court denied the district attorney's request to transfer the case to adult court, appellant admitted both counts of the

[2] All further statutory references are to the Penal Code except as otherwise indicated.

second amended petition. The court accordingly found jurisdiction, and the matter proceeded to disposition.

A contested disposition hearing took place over several days in April and May of 2018. The primary issue before the court was whether appellant should be directed to participate in a Sober Living Environment (SLE) such as West Coast Recovery Sober Living Homes (West Coast Recovery)— which had already accepted him— or committed to the DJJ. In an April 2018 report (filed in May), Zachary Holcomb, appellant's probation officer since January, expressed the view that "the circumstances and gravity of the offense is [*sic*] beyond that of a typical delinquent act committed by a juvenile." He also noted that at almost 20 years old, appellant was not eligible to participate in the program offered by the Juvenile Rehabilitation Facility or to be screened for a "Private Institutional Placement." Additionally, when he turned 21 appellant would be beyond the jurisdiction of the Juvenile Justice Court, thus affording him only one year of rehabilitative services. Holcomb considered the option of probation with outpatient sex offender counseling; again, however, as appellant was already 20, only one year would be available under the juvenile court's jurisdiction, and he was already under orders to complete sex offender counseling in connection with the adult offense.

Holcomb noted that after a witness saw him sodomizing N.M., appellant told him to "be smooth"— which Holcomb understood to mean "don't talk about it" or the witness "would also get into trouble." Holcomb also noted that the victim in the adult case was only 15, there was another male participant, and controlled substances were again involved. In view of appellant's commission of the adult sex offense three years after the first, Holcomb believed that appellant had failed to "self-correct" and therefore required "intensive rehabilitation." Consequently, the "most viable [d]ispositional option" for the minor was a commitment to the DJJ. That outcome offered "the most comprehensive treatment program for him that's going to meet all his needs. It's going to meet his

immaturity, poor judgment. It's going to give him life skills that he needs. It's going to address substance abuse, on-site substance abuse service, but most importantly, it's going to address the sex offender behavior and address accountability and community safety."

The court heard from several other witnesses, including appellant's parents and the assistant manager of West Coast Recovery. Carolyn Murphy, Ph.D., testified as an expert in dispositional treatment recommendations, risk assessment, and substance abuse for sex offenders. Dr. Murphy had previously evaluated appellant in preparation for his transfer hearing. Based on her meeting with him and reviewing documents related to the case but without testing, her impression of appellant was that he was in "the lower end of average range" in intelligence because he appeared to have an auditory processing problem that required providers to slow down their speech and simplify their language. He also presented as "slightly less mature than other young adults of his age [whom she had] evaluated . . . in the past."

Dr. Murphy did not believe that J.B. had paraphilia or a conduct disorder. She described him as "a young person who, when in the company of other peers, makes and has made bad decisions regarding his sexual behavior. That isn't necessarily mirrored in any other aspects of his life." So peer influence— though not as peer pressure— was a factor in appellant's conduct; and although he did need and could benefit from sex offender treatment, he did not pose the same kind of risk as in a "typical adult male who . . . had raped or molested a child of his own accord with no other involvement from anyone else." Dr. Murphy emphasized that when appellant committed the juvenile offense he was a teenager; the "area of the brain that is responsible for anticipating consequences, impulse control, judgment, and scenario analysis [was] not fully developed. And [he was] also socially emotionally in that phase and stage of development where you go along with the crowd." When asked whether it was significant that appellant was 15 at the time of the offense, the witness said yes, because "he was a younger adolescent. Full intellectual capacity and functioning [aren't]

completely developed until around age 16." In giving this answer the witness apparently did not recognize that appellant was only two weeks short of his 16th birthday when he engaged in the criminal activity involving N.M.

Dr. Murphy believed that while substance abuse should be addressed in a treatment program, appellant did not pose a significant risk to the community; consequently he would benefit from an SLE with positive peer influences and "some sort of sex offender treatment, which is typically [given] in outpatient group sessions once to twice weekly." She did not believe that the public would be served if appellant were ordered to register as a sex offender.

Dr. Robert Land also testified as an expert in sexual offender treatment and risk assessment. Having performed psychological assessments on "probably over 100" juvenile sex offenders and having treated close to 100 juvenile sex offenders, he administered the Static-99, a tool for assessing risk of sexual recidivism, to appellant. Appellant scored a three out of 10, putting him at an average risk for sexually reoffending, or a 7.9 percent chance of recidivism within five years.[3] Dr. Land believed that appellant's conduct in both cases was not predatory but opportunistic. He also believed that if appellant had previously participated in substance abuse treatment, the second (adult) crime might not have occurred. Dr. Land therefore recommended substance abuse treatment and sex offender treatment; substance abuse treatment was an important protective factor against recidivism. In an SLE appellant would be given the structure to participate in substance abuse treatment, and he would be surrounded with other individuals who were working on their sobriety.[4] The benefits of an SLE over a locked facility were that the residents could maintain connections with support people,

[3] If appellant had been 35 or older and had previously lived with a romantic partner for more than two years, his score would have been only one.

[4] Richard French, the assistant manager at West Coast Recovery, testified that the ages of the men residing at the center ranged from 28 to 55.

such as family members, an important deterrent to recidivism; they could have a job; they could build "prosocial skills" and practice those in the community; they could attend 12-step meetings and continue attending after leaving the SLE; and they would find the transition to the "real world" easier. With some low- to moderate-risk individuals, being in residential treatment with high-risk offenders could be dangerous. Dr. Land's concern for appellant was that he might connect with and be influenced by those high-risk offenders and maintain those relationships after discharge, "because he's more of a follower and these were opportunistic crimes."

Dr. Land also weighed in on the subject of section 290 registration: For young adults, registration as a sex offender can cause social harms— such as loss of social support systems, being labeled in the community, and vigilante attacks— and psychological harms such as shame, embarrassment, loss of self-esteem, hopelessness, and even suicidality. As a section 290 registrant and given his learning difficulties, appellant could have challenges finding employment.

Dr. Land said that he was willing to provide appellant with individual sex offender treatment if he were to reside at an SLE such as West Coast Recovery. Alternatively, Dr. Land said he would provide that treatment while appellant remained at the Elmwood Correctional Facility, even if he were ordered to remain in custody there for eight months or longer. On the other hand, he found the sexual behavioral counseling at the DJJ to be a " very good program." The only "downside" to that service, he believed, is that the person is a section 290 registrant for life.[5] He did not know whether there was a substance abuse treatment component in the DJJ program.

[5] Dr. Land was not questioned about his understanding of the new registration provisions of section 290.008, operative January 1, 2021, which established two tiers of sex offender registration for wards of the juvenile court upon discharge from the DJJ. A "tier one juvenile offender" will be subject to registration for at least five years; a "tier two" offender must register for at least 10 years. (Stats. 2017, ch. 541, § 6.)

Holcomb also testified at the disposition hearing. Since his incarceration in jail in May 2017 appellant had not participated in any rehabilitative classes, counseling, or other services; appellant had explained to Holcomb, inaccurately, that because he was in protective custody he was not eligible for any programs.

In Holcomb's view, weekly outpatient sex offender counseling would be insufficient for appellant; in addition to the gravity of the offense, appellant's current age would limit the amount of time left for treatment to only one year. The weekly outpatient solution also would not address the issues Holcomb had identified through the Juvenile Assessment and Intervention System (JAIS) risk assessment tool. Using the JAIS, Holcomb found appellant to be at a moderate risk for reoffending: his risk factor was "highly significant" for "social inadequacy," which was related to his immaturity and need for peer acceptance; "[s]ignificant" based on lack of parental supervision; highly significant for "emotional factors," based on his expression of anger and his impulsivity; and "highly significant" as to relationships and drug abuse.

Of the disposition options Holcomb considered, probation at home with outpatient treatment was inappropriate; appellant was ineligible for the ranch program because he was over 18; and an SLE such as West Coast Recovery would not address either the community safety component or his sexual offender behavior. In addition, it would not offer a secure facility; appellant "could walk away at any time," and he needed more structure than West Coast Recovery could provide. The DJJ, on the other hand, would be equipped to address the issues identified by the JAIS in a structured setting. It provided individual and group therapy, substance abuse counseling, and a sexual behavior treatment program that Holcomb believed would benefit appellant.[6] The rehabilitation

[6] Holcomb described the program as a unit within the DJJ "specifically designed for sex offenders in the juvenile system. It's a therapeutic communal living environment that offers therapy, group and individual[;] a lot of cognitive behavioral therapy[;] social skills activities[;] a lot of work towards rehabilitation, towards victim awareness, victim

services afforded to appellant could be provided for longer than just one year, and appellant would receive services to facilitate his successful reentry into the community. Public safety would be addressed as well, since appellant would be in a locked facility.

On cross-examination, Holcomb acknowledged that in his meetings with appellant, appellant was polite and willing to comply with the terms of probation to the best of his ability. He also agreed with defense counsel that appellant was never given substance abuse treatment, mental health treatment, or sex offender treatment. Had he been arrested at the time he committed the offense, more dispositional options would have been available to him. In addition, two doctors Holcomb had consulted had told him that most sex offenders can reach rehabilitation goals within eight to nine months. Neither of these consultants, however, had had experience with rape in concert or sodomy in concert.

Holcomb further acknowledged that he was trained to explore the least restrictive dispositional alternatives for youth, and that the DJJ was the most restrictive. He noted, however, that he had to take into account the seriousness of an offense, accountability, and community safety as well as age. That other options were available did not mean that he would have recommended those in appellant's case; at that time the second offense, which contributed to Holcomb's opinion, had not yet occurred. As to the descriptions of appellant as merely a follower who succumbed to peer influence, school records reviewed by Holcomb revealed several incidents of discipline involving "cyberbullying" another student by sending and posting sexually harassing comments about her, bringing alcohol to school and sharing it with other students, possession of drug paraphernalia, fighting and instigating a fight by two other students, making lewd comments in class, and causing physical injury on more than one occasion.

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empathy, past trauma, collateral issues such as substance abuse that may impede treatment programs."

After reviewing all of the testimony and the exhibits supplied by both parties, the juvenile court found Holcomb's testimony "compelling" in recommending a DJJ commitment, noting in particular "the severity of the offense, the age of the victim, the adult case, the sexual treatment needs of [the minor], the drug treatment needs of [the minor], accountability for two sex crimes, and community safety." The court recognized the "downsides" to the DJJ program: the uncertainty regarding the section 290 registration requirement,[7] the social and personal harm described by Dr. Land, and the view of Drs. Land and Murphy that with treatment appellant would not pose a threat to the community. The court expressed concern about the paucity of evidence regarding substance abuse treatment at the DJJ; yet it found evidence of a "serious drug treatment" program at West Coast Recovery "even less compelling."

The court thus agreed with Holcomb that appellant should be committed to the DJJ facility, "as it will provide a benefit for him while holding him accountable and protecting society." On May 17, 2018 the court adjudged appellant to be a ward of the juvenile court and committed him to the DJJ. Appellant then filed a timely notice of appeal.

Discussion

Appellant contends that the decision to commit him to the DJJ was an abuse of the juvenile court's discretion because there was no evidence that the less restrictive option of the SLE would have been inappropriate or that a DJJ commitment would have been in his best interests. Alternatively, he suggests that the court abused its discretion by failing to consider keeping him in jail with treatment there by Dr. Land.

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[7] The court expressed the hope that the recent statutory amendments would alleviate "some of the onerous requirements" of section 290 registration. The court added, "I personally find in my own experience that the 290 registration requirements are probably not suited for minors because there's simply fairly well established scientific basis for believing that juvenile sex offenders do not operate on the same basis as adult sex offenders, and I hope the [L]egislature will one day correct that issue."

Welfare and Institutions Code, section 202, subdivision (b), provides that minors " 'under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances.' " This statute makes it clear that both rehabilitation and public safety are concerns in determining the appropriate disposition of a juvenile offender. (*In re J.W.* (2015) 236 Cal.App.4th 663, 667-668.) Notably, however, "[t]he statutory scheme governing juvenile delinquency is designed to give the court 'maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it.' [Citation.] Flexibility is the hallmark of juvenile court law, in both delinquency and dependency interventions. [Citation.]" (*In re Greg F.* (2012) 55 Cal.4th 393, 411.)

With the dual purposes of the juvenile court law in mind, we review the disposition order for abuse of discretion. An appellate court will not lightly substitute its decision for that of the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395; accord, *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396 (*Angela M.*).) " ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' [Citation.]" (*In re George T.* (2004) 33 Cal.4th 620, 631 (*George T.*).)

Appellant contends that there was no substantial evidence that outpatient sex offender treatment in an SLE or in jail would have been ineffective or inappropriate and contrary to his best interests. We disagree. "A DJJ commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the minor from the commitment and less restrictive alternatives would be ineffective or inappropriate."

(*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250; accord, *In re A.R.* (2018) 24 Cal.App.5th 1076, 1080 (*A.R.*).) Although the record must contain evidence of *both* a probable benefit to the minor by a [DJJ] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives, (*Angela M.*, *supra*, 111 Cal.App.4th at p. 1396; *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576), "there is no absolute rule that a [DJJ] commitment should never be ordered unless less restrictive placements have been attempted. [Citations.]" (*In re Ricky H.* (1981) 30 Cal.3d 176, 183; *In re Asean D.* (1993) 14 Cal.App.4th 467, 473 ["a commitment to the [DJJ] may be made in the first instance, without previous resort to less restrictive placements"]; compare *A.R.*, *supra*, at pp. 1080-1081 [finding substantial evidence of probable benefit to DJJ commitment and inappropriateness of a less restrictive placement] with *In re Carlos J.* (2018) 22 Cal.App.5th 1, 10 [juvenile court's finding of probable benefit not supported by substantial evidence].) Thus, a court "[does not] necessarily abuse its discretion by ordering the most restrictive placement before other options have been tried." (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.)

We find no abuse of discretion in this case. Unquestionably, less restrictive options—namely, West Coast Recovery or treatment in jail—were available, but the court considered those and determined that they were insufficient to meet appellant's need for intensive drug and sex offender treatment.[8] Even Dr. Land testified that the DJJ

[8] Richard French, the assistant manager at West Coast Recovery, stated that the residents were assigned chores and were required to attend 12-step substance abuse meetings, along with anything else the court ordered, such as drug testing or curfews tailored to the individual. Otherwise, after the first two weeks of restriction, the residents were encouraged to do things to better themselves and not stay at the house all day; "it's up to them to pretty much keep themselves busy." He confirmed that the facility was not locked: "You can leave whenever you want. You get out what you put into it. If you want to stay and better [yourself], that's what we want." Sometimes "people relapse, and they go out and don't come back . . . We can't keep people or hold them down to stay at the house. . . ."

program was "a very good program" which would address "the intensive treatment needs" of appellant. The "only downside," he noted, was the requirement to register as a sex offender, a concern expressed by Dr. Murphy as well. And although Dr. Murphy did not believe appellant posed a significant risk to the community and would benefit from an SLE together with additional sex offender treatment, the court was more persuaded by Holcomb's opinion that appellant needed the structure of a secure facility, which would at the same time protect the public. The court also found it noteworthy that this was the first time Holcomb had urged placement at the DJJ rather than a less restrictive alternative. That the evidence of a "robust drug treatment program" at the DJJ was " 'paper thin' " did not convince the court otherwise, as "the evidence of a serious drug treatment [program] at West Coast Recovery [was] even less compelling." The court also could have reasonably considered the environment at county jail as well as the treatment options there to be inadequate or inappropriate.

The record thus contains substantial documentary and testimonial evidence to support the juvenile court's decision. Those findings reasonably justify the court's conclusion that neither the proposed SLE nor confinement at the jail would provide both the intensive treatment and supervision appellant needed. Whether we would have chosen a less restrictive solution such as West Coast Recovery or treatment within the county jail is immaterial, because we may not substitute our view of the evidence for the juvenile court's factual findings. (See *George T.*, *supra*, 33 Cal.4th at p. 631 [if the circumstances reasonably justify the trier of fact's findings, the reviewing court's opinion that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment].) Accordingly, reversal is not warranted on this record.

Disposition

The order is affirmed.

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ELIA, J.

WE CONCUR:

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GREENWOOD, P. J.

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PREMO, J.

People v. J.B.
H045837